In the High Court of Judicature for Rajasthan

Jaipur Bench

**

Cr. Msc. Petition No.758/2007
Islam & (4) Ors. ***Versus*** State

Date of Order ::: 06/11/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. Satish Khandelwal) for Shri Dharam Gopal Chaturvedi
Mr. Mukesh Sharma)for petitioners (accused)
Mr. Arun Sharma, Public Prosecutor .
Mr. Kamlendra Singh for respondent (complainant)

Instant petition U/s 482, CrPC has been filed against order dt.19/08/96 whereby Judl. Mag. Kama took cognizance of offences U/Ss 302/149, 148, 307, 326, 324, 323, 342, 427 & 452, IPC against petitioners, which was upheld by Addl. Sess. Judge No.2, Deeg (Bharatpur) in Cr.Rev.-28/97 (53/2002) order dt.05/04/07.

A written report was lodged by Sumer (complainant) on 23/03/1989, alleging inter-alia that on 22/03/89 at about 6.30-7 O' clock in the morning, on way, while his cousin (Alam S/o paternal uncle) was going towards his field; members of accused party including petitioners duly armed with hockey, pick-axe, Ballam, surrounded Alam and took him to nearby Nohra (open place) and one of accused Majid loudly said not to leave him alive and started beating him

jointly; any how Alam rushed from there and while screaming near Nohra, certain family members gathered to rescue him but all of them were beaten by accused party with sharp edged & blunt weapons - on which FIR-21/89 for offences U/Ss 147, 148, 149, 323, 341, 379, IPC was registered at PS Jurhara (Bharatpur) against accused named in the report including petitioners herein; and after death of injured Alam, offence of S.302, IPC was also added. After investigation, on 19/05/89 police submitted charge sheet for commission of offences U/Ss 147, 148, 149, 302, 307, 326, 323, 341, 342, 427, 452, IPC against 17 persons other than 6 persons including petitioners, against whom no charge sheet was filed.

Before cognizance could be taken against accused named in police charge sheet, complainant filed protest petition, on which after recording of statements U/s 200 & 202, CrPC and taking note whereof, trial Magistrate took cognizance of offences U/Ss 302/149, 307, 326, 324, 323, 342, 427, 452, 148, IPC against petitioners, as well vide order dt.10/07/90 and issued process by way of arrest warrant and matter was consolidated with challan case – against which petitioners preferred revision petition which was allowed by Court of

Revision vide order dt.06/11/93 while remanding the matter, directed the trial Magistrate to make an inquiry after considering negative police report and other material on record particularly statement of complainant & his witnesses U/s 200 & 202, CrPC and pass fresh order – pursuant thereof, trial Magistrate after taking note whereof, took cognizance of offences (supra) against petitioners vide order dt.19/08/96 – against which misc petitions No.170/97 & 798/96 were filed by petitioners wherein this Court vide order dt. 19/03/97 sent the matter to the Court of Revision for decision and accordingly, vide order dated 05/04/07 impugned, Court of Revision dismissed revisions of the petitioners & Chahat who died pendente revision petition. Hence this petition.

Basic & foremost contentions urged by Counsel for petitioners is that despite offences alleged are exclusively triable by Court of Sessions, against petitioners no challan was filed by police, as such Magistrate has no jurisdiction to take cognizance in exercise of powers U/s 209, CrPC while committing the case to Court of Sessions for trial against accused having been challaned by police. Counsel submits that after

thorough investigation, police did not find prima facie evidence constituting commission of the crime impugned against petitioners who were not charge-sheeted - in absence of evidence afresh led, it was not open for the Magistrate as is envisaged U/s 319, CrPC, to add petitioners as accused at the stage of committing police case to the Court of Sessions for alleged offences exclusively triable by Sessions Judge,; in such circumstances, very order taking cognizance by trial Magistrate vide order impugned deserves to be set aside. In support, Counsel placed reliance upon decisions of Apex Court in **Raj Kishore Prasad Vs. State of Bihar (1996 SCC (Cr) 772) and of this Court in Kalamuddin Vs. State (2005(2) RCC 972); Nathi Singh Vs. State (2007(2) R.Cr.D. 401**.

Public Prosecutor duly associated by Counsel for complainant while supporting order impugned jointly submit that since there was no committal order being passed by trial Magistrate by that time and who has not applied mind for want of charge sheet while taking cognizance against others who were not charge sheeted; and much before it, protest petition being filed and after recording statements recorded U/Ss 200 & 202, CrPC and taking note whereof, learned Magistrate found

substance and sufficient material for taking cognizance against petitioners, as well; as such no error has been committed by Magistrate while taking cognizance against petitioners who have not been charge sheeted. In support, Counsel placed reliance upon decisions of Apex Court in **Raghubans Dueby Vs. State of Bihar (AIR 1967 SC 1167);** and of Kerala High Court **(Full Bench) in Kesavan Natesan Vs. Madhavan Peetham Bharan (1984 CrLJ 324)** and of this Court **in Sukharam Vs. State (2007 (1) Crimes 246)**.

This Court has considered rival contentions of both the parties and with their assistance, pondered over material on record. Basic question for consideration is as to whether judicial Magistrate on protest petition being filed by complainant and after recording of statements U/Ss 200 & 202, CrPC, can add accused being left out by police while filing charge sheet and committing the case to Court of Sessions for trial against accused who were left out by police ?

Sections 209 & 319 CrPC being relevant for consideration of crucial issue are set out below one after the other :

"**209. Commitment of case to Court**

of Session when offence is triable exclusively by it. - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b)subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c)send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d)notify the Public Prosecutor of the commitment of the case to the Court of Session."

"**319. Power to proceed against other persons appearing to be guilty of offence.**

(1) Where in the course of any inquiry into, or trial of, an offence it appears from the evidence that any person not being the

> accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> **(2)** Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> **(3)** Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> **(4)** Where the Court proceeds against any person under sub-section (1) then -
>
> **(a)** the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;
>
> **(b)** subject to the provisions of clause (a) the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

Alike issue herein came up for consideration before Apex Court in **Raj Kishore Prasad Vs. State of Bihar**) while examining scope of Sections 209 & 319, CrPC finally observed ad infra:

"16. Thus we come to hold that the power under section 209 CrPC to summon a new offender was not vested with a Magistrate on the plain reading of its text as well as proceedings before him not being an 'inquiry' and material before him not being 'evidence'. **When such power was not so vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Session itself awaiting the case on commitment, merely on the specious ground that the Court of Session can, in any event, summon the accused to stand trial, alongwith the accused meant to be committed for trial before it**. Presently it is plain that the stage for employment of Section 319, CrPC has not arrived. The order of the Court of Sessions requiring the Magistrate to arrest and logically commit the appellant along with the accused proposed to be committed to stand for trial before it, is patently illegal and beyond jurisdiction. Since the Magistrate has no such power to add a person as accused U/s 319 CrPC when handling a matter under section 209, CrPC, the Court of Sessions, in purported exercise of revisional powers cannot obligate it do so. The question posed at the outset is answered accordingly in this light. When the case comes after commitment to the court of

> Session and evident is recorded, it may then in exercise of its powers under Section 319, CrPC on the basis of evidence recorded by it if circumstances warranting, proceed against appellant, summon him for the purpose, to stand trial alongwith the accused committed, providing him the necessary safeguards envisaged under sub-section (4) of Section 319. Such course is all the more necessary in the instant case when expressions on merit have extensively been made in the orders of the Magistrate, the Court of Session and that of the High Court. Any other course would cause serious prejudice to the appellant. We order accordingly."

In the light of decision of Apex Court (supra), it is manifest that the Magistrate having limited function is not obliged to apply mind so as to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon truthfulness of any version and his role is only to see that package sent to the Court of Sessions is in order so as to proceed straightway with the trial and nothing is lacking in content, as provided U/Ss 207 & 208, CrPC; because the Magistrate at the stage of S.209, CrPC is forbidden to apply his mind to the merits of matter and determine as to whether any accused

need be added or subtracted to face trial before the Court of Sessions.

In **Natthi Singh Vs. State (**supra), this Court observed that while applying judicial mind to materials on record U/s 209, CrPC, the Magistrate is only required to pass order against the accused appearing and brought before him and taking note of an offence in a judicial capacity with a view to initiate proceedings against the accused not before Magistrate is not permitted U/s 209, CrPC. This Court further observed that learned Committing Magistrate while invoking S.209, CrPC has no jurisdiction to add accused who were not before him being left out by police while filing challan and U/s 209, CrPC, order could only be passed against those accused who either appeared or brought before the Committing Magistrate.

Similarly, taking note of series of decisions of Apex Court, this Court in **Kalamudden Vs. State** (supra) observed that in a case exclusively triable by Court of Session, cognizance of offence against persons other than those named in charge sheet cannot be taken by the committing Magistrate. Thus, involving persons other than those brought before Magistrate while

filing challan, can be considered only if it comes in course of evidence recorded during trial in exercise of powers U/s 319, CrPC.

Judgment in **Raghubans Dubey Vs. State of Bihar** (supra) cited by Counsel for complainant is of no assistance for the reason that in that case, while examining scope of Sections 190, 173, 207-A & 251-A of Old CrPC (1898), which now stands amended by CrPC 1973 and such alike question never came up for consideration. In **Sukharam Vs. State** (supra) question arose as to whether Magistrate was bound to accept negative final report and to apply his mind independently of conclusion arrived at by police upon receipt of police report U/s 173 (2) CrPC while taking cognizance of an offence U/s 190(1)(b) which is not the question involved herein.

In view of what has been legally propounded (supra), this Court is of the opinion that the Magistrate has committed jurisdictional error in taking cognizance against petitioners for offences (supra).

Consequently, misc. petition succeeds and is hereby allowed. Orders dt.19/08/96 of Judicial Mag. Kama and dt.05/04/07 of Court of Revision are set aside – as a consequence whereof, proceedings

initiated against the petitioners are hereby quashed & set aside.

However, this Court makes it clear that mere quashing of proceedings against petitioners will not prevent the trial Court from exercising its discretion U/s 319, CrPC, if it is fully satisfied that a case for taking cognizance against them has been made out on evidence led before it in course of trial.

A copy of this order be sent forthwith to the trial Court to proceed in accordance with law and expedite the trial in FIR No.21/89 (supra).

(**Ajay Rastogi), J.**

K.Khatri/p12/758CrMscP07.doc